UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NOS. 12-CA-19668, et al.

GOYA FOODS OF FLORIDA, INC.,

Petitioner,

v.

SOUTHERN REGIONAL JOINT BOARD,
WORKERS UNITED, a/w SEIU,

Respondent.
_____/

PETITIONER'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE

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COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN RESPONSE TO GOYA'S BRIEF IN SUPPORT OF EXCEPTIONS FAILS TO REBUT GOYA'S ARGUMENTS.

A. The Judge's Decision Violates The Obligation To Engage in Reasoned Decisionmaking And Is, Therefore, Not Based On Substantial Evidence.

Goya's initial brief amply demonstrates the many reasons the Board should reverse the administrative law judge's decision in this case.[1] The answer brief of counsel for the general counsel essentially parrots the decision and, thus, is likewise without merit. The Board should not pin its prestige or affix its imprimatur to such a decision.

Allentown Mack v. NLRB, 522 U.S. 359, 374 (1998), stands as the Supreme Court's ringing admonition to the Board that it must engage in "reasoned decisionmaking," meaning its decisions must both be within the scope of its lawful authority and be logical and rational. The Board violated this standard in *Allentown Mack* when it stated one standard for reaching decisions in certain types of cases but actually applied another. *Id*. at 380. Significantly for the instant case, *Allentown Mack* also dealt with an evidentiary question in which the Board, the Court stated, consistently undervalued certain types of evidence or, put another way, systematically exaggerated what the evidence had to prove. *Id*. at 378. The Court, analyzing the nature and scope of judicial review of whether Board decisions are based on substantial evidence, declared that

> when the Board purports to be engaged in simple factfinding, unconstrained by substantive presumptions or evidentiary rules of exclusion, it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands. "Substantial evidence" review exists precisely to ensure that the Board achieves minimal

[1] Or, at a minimum and with regard to the revocation of the subpoena ad testificandum of Arturo Ross, to remand the case to receive that testimony.

> compliance with this obligation, which is the foundation of all honest and legitimate adjudication.

Id. at 378-79. The same applies to the factfinding, including credibility resolutions, of an administrative law judge whose decision is under review by the Board.

That fundamental principle is violated in this case. The decision of the administrative law judge, supported by the brief of counsel for the general counsel, departs from reasoned decisionmaking – particularly in its credibility resolutions – and is not based on substantial evidence. The decision and counsel for the general counsel's brief are filled with conclusory assertions rather than reasoned analysis, distinctions without a difference of legal authority, and "heads I win, tails you lose" argument.[2]

The irrationality of the decision exists throughout. However, it is most glaring in the judge's stunning credibility resolutions, her conclusion that the settlements were unreasonable, and her dismissal of the one *Independent Stave*[3] factor she could not somehow turn against Goya. By focusing on these points, all addressed in counsel for the general counsel's brief, Goya does not waive or abandon any defense, issue, theory, or argument raised previously.

Because the decision grossly violates the requirement of reasoned decisionmaking spelled out in *Allentown Mack*, the Board should reverse the judge and dismiss the specification and should give effect to the settlements.

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[2] A particularly egregious example occurs at page 18 of counsel for the general counsel's brief, where she states, "In fact, more sophisticated individuals have done the same [signed an agreement without reading or checking it or consulting anyone] when faced with economic hardship and offered settlement by a large, powerful corporation such as Respondent." Counsel for the general counsel is making an express statement of fact with no basis in the record. Perhaps she is testifying herself. In any case, this sort of baseless assertion of fact is unworthy of consideration and is typical.

[3] 287 NLRB 740 (1987).

B. The Judge's Finding That Turienzo And Martin Should Be Credited And Goya's Executives Should Not Is Irrational.

Perhaps nothing in the entire decision so well encapsulates the failure of reasoned decisionmaking as the judge's reason for crediting Turienzo and Martin over the two Goya executives – Robert and Frank Unanue – who testified. The testimony of the Unanues, she wrote, was consistent and precise. The testimony of Turienzo and Martin was not polished and "was much less specific," which is another way of saying "vague." Therefore, she finds the Unanues were not believable and the other two were.

This method of resolving credibility issues turns rationality upside down. Testimony that is corroborated by another witness is more worthy of credit that testimony that is uncorroborated or with which other testimony is inconsistent. The Board applies this principle. *See, e.g.*, *Domsey Trading Corp.*, 351 NLRB 824, 849 (2007) (finding judge erred by failing to credit consistent testimony).[4] Certainly the courts do. Corroborative testimony not only confirms the initial testimony, but can be so powerful that it is routinely used to rehabilitate testimony that has been challenged by contradiction. *See, e.g., U.S. v. Attaway*, 449 F.2d 309 (5th Cir. 1971).

The judge and counsel for the general counsel obviously recognize the absurdity of this reasoning because both spend considerable space apologizing for Turienzo and Martin's "unpolished" and not so specific testimony. Implicitly admitting that the testimony was not credible, both judge and counsel for general counsel forgive its shortcomings by attributing them to the interpreter, the stress of being in a hearing, or the objections of counsel. It should not have to be said – though perhaps it must be – that these conditions apply to anyone in these

[4] Counsel for the general counsel states that *Domsey* and other cases cited by Goya in its initial brief for this proposition were "inapposite" based on distinctions that do not affect the applicability of the reasoning in the cases. The cases cited by Goya are "apposite" to the present case and fully support its reasoning.

circumstances and do not excuse or make up for the inconsistencies and contradictions in their testimony.[5]

As to the substance of the conflicting testimony, the judge utterly ignores the blatant unbelievability of the stories Turienzo and Martin told.[6] In essence, they claim they were told that "Goya has won the litigation and, therefore, Goya wants to pay you money." The judge states that she believes this nonsense. However, she disbelieves that Turienzo, the union leader who had been front and center in a labor dispute, including bargaining, with Goya for years, and who was officially employed by the union after his termination by Goya and around the time he signed the settlement, would be capable of recognizing that he might be able to get money from Goya if he promised to stop his public slander.

The judge also openly and dismally fails to engage in reasoned decisionmaking in her analysis of the allegations about Gilberto Torres. She concludes, correctly, that Torres could not have been an agent of Goya. Therefore, any allegations about what he said or did not say to

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5 Counsel for the general counsel tries to explain away one flagrant lie by Turienzo by deflection. Turienzo initially testified that, at the time of the settlements, he had not worked since he left Goya. On cross-examination, he admitted he had been employed by the union. T 162, 170-71. Counsel for the general counsel asserts, without support, that Turienzo was confusing any work whatsoever with work of the sort he performed at Goya. The weakness of this excuse merely further highlights the bald-faced nature of Turienzo's lie. She further seeks to bolster his testimony by asserting that he was previously found to be a credible witness by a retired administrative law judge in a trial 11 years ago. She provides no authority for the proposition that giving credited testimony more than a decade earlier means a witness will be truthful today. It is obvious, of course, that his testimony then has nothing to do with the present issues.

6 The judge bases her finding that the settlements were obtained by "fraud" primarily on her credibility resolution. Fraud, however, requires an intentional material misrepresentation intended to be and that was reasonably relied upon. Assuming, arguendo, that the absurd story told by Turienzo and Martin were true, such a tale could not be reasonably relied upon by anyone – not even the untutored rubes that the judge and counsel for the general counsel inappropriately portray the two employees to be. Even less reasonable is the men's failure to check whether the case had been decided, a matter easily checked by anyone with a single call to the local office of the Board or the union.

Martin are legally irrelevant. Nonetheless, she dwells for paragraphs on Martin's claim that Torres urged him to take the settlement and lists at length the loans Torres received from Goya.[7] The falsity of the claims and the flimsiness of the loan evidence aside, if nothing Torres did or said could bear on the legal question, why would the judge spend so much time on it? It is clear that she did rely on the Torres allegations in coming to her finding relating to fraud. For that reason alone, her conclusion is erroneous. What is more, she completely ignored Torres' flat denials of the allegations and failed to resolve the credibility issue they created. Counsel for the general counsel has no defense for the judge's failing and, therefore, is likewise silent.

At bottom, the judge's credibility resolutions pervert evidentiary principles, ignore evidence, and are counter to rationality. They are quintessentially not reasoned decisionmaking. The fraud finding is the heart and soul of counsel for the general counsel's case and it is flat, dead wrong. The judge's decision is not based on substantial evidence and should be rejected by the Board.

C. The Judge's Treatment Of The *Independent Stave* Factors Is Contrary To Law And Announces One Principle While Applying A Different One.

The judge, seconded by counsel for the general counsel, finds that the settlements were not just unreasonable, but "totally unreasonable." She does so primarily because these settlements with two individuals whose remedies would have been reinstatement and back pay did not negotiate and win concessions from Goya such as postings, changes in assignments to sales staff, giving telephones to drivers, and many other claims that had not yet been decided and had absolutely nothing to do with them. She also finds the back pay amounts that the individuals bargained for to be inadequate given what she implicitly concludes was the low risk inherent in

[7] The judge ignores the evidence that shows the loans were repaid and that almost all Goya employees receive them.

the litigation at that time. That risk, apparently, was to be assessed by Goya in determining how much to offer. There is no legal basis for any of this reasoning.

No authority can be found that holds that a settlement by discriminatees whose individual allegations are two of literally dozens piled into a large consolidated complaint must address all the unrelated claims in the cases. If this were the case, then no settlements would ever be concluded. How could they, when this result would allow a single individual to settle the case for everyone involved. This assertion by the judge and supported by counsel for the general counsel is repugnant to the Act's policy favoring settlement of charges.

There is likewise zero authority for the idea that the risk inherent in litigation is as it is judged by the employer. Counsel for the general counsel asserts in her brief that the judge made clear that Goya should have realized the strength of the Board's case in late 2000 when the settlements were signed. The unstated conclusion is that Goya should, therefore, have offered much more money and thereby made the settlement amounts reasonable. However, the record shows that the amounts were at or close to 100 percent of back pay putatively owed at the time. Liability had not even been preliminarily determined. In *Beverly California Corp. v. NLRB*, 253 F.3d 291 (7th Cir. 2001), the court observed that the Board judges the reasonableness of the amount of a settlement by the fraction of back pay it represents. Counsel for the general counsel and the judge apparently believe 100 percent is unreasonable and desire a premium, instead.

Again, this reasoning is unsupported and irrational. There is no legal basis, so it is unprincipled and contrary to law. The settlements were demonstrably reasonable, as they paid 100 percent of back pay putatively owed, addressed the concerns of these two individuals, and made these relatively large payments at a time when the litigation was in doubt and would continue to be in doubt for eight years (as to liability) and to this day (as to remedy).

Finally, as noted in counsel for the general counsel's brief and argued in Goya's initial brief, the judge noted that one *Independent Stave* factor could not support a finding against Goya – and, therefore, was not to be given any weight at all. It is incontrovertible that Goya had no history of violations of the Act or breaching settlement agreements. The judge apparently could not bring herself to give any weight at all to a factor favorable to Goya. Instead, she dismissed it by saying it did not figure into the analysis. This is contrary to law. The test is the totality of the circumstances, which means that weight must be given each factor, no matter whom it favors. Moreover, no single factor is given determinative weight. *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 615 (2007). Instead, contrary to controlling precedent, the judge completely eliminates the one factor she could not deny favored Goya. This subversion of principled decision-making parallels that condemned by the Supreme Court in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). In that case dealing with the Board's improper policy of limiting the "responsible direction" aspect of supervision in nursing cases, the Court stated:

> We therefore rejected the Board's analysis as "inconsistent with ... the statutory language," because it "rea[d] the responsible direction portion of § 2(11) out of the statute in nurse cases." *Id.*, at 579-580, 114 S.Ct. 1778. It is impossible to avoid the conclusion that the Board's interpretation of "independent judgment," applied to nurses for the first time after our decision in *Health Care*, has precisely the same object. This interpretation of "independent judgment" is no less strained than the interpretation of "in the interest of the employer" that it has succeeded. Cf. *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998) (an agency that announces one principle but applies another is not acting rationally under the Act).

Id. at 717. In *Kentucky River*, the Court held that the Board had once before sought to limit the supervisory principle as to nurses and been corrected. The Court observed that the Board now was doing the same thing and that it was still improper.

Just so, the judge in this case is ignoring the announced principle that settlement cases such as this one are judged by the totality of the circumstances. She gives lip service to the principle, but applies a different standard, i.e., that factors favoring the employer "do not figure in the analysis." Her reasoning here, as elsewhere, is bankrupt and violates the command of *Allentown Mack* that administrative decision-making be reasoned and rational in order to constitute honest and legitimate adjudication.

D. The Award Of Inflated Back Pay To Individuals Who Knowingly Sat On Their Rights To The Prejudice Of Goya Is Unreasonable And Violates Basic Notions Of Fairness.

The individuals learned of the outcome of the liability portion of these proceedings at least by 2008, the date of the statements they gave to the Board agents regarding the settlements. It is more than reasonable to infer that they knew in 2006 when the Board decision was pronounced. The Board knew of the settlements before they were signed – a fact that would have been in the record had Arturo Ross not wrongly been barred from testifying. It certainly knew of them in 2006, when Goya filed its Motion for Reconsideration and to Reopen the Hearing. Yet, both the individuals and the Board waited for years upon years to challenge the settlements' effectiveness. During those years of waiting – most of it caused by the Board's own inexplicable six-year delay in reaching its decision – the potential back pay obligation piled up. While it may unfortunately be Board precedent that it rarely or never permits a laches defense as a result of its own official actions, the same should not apply to rewarding the knowing delay by these individuals to Goya's great prejudice. They should not be rewarded for sitting back and watching the potential back pay award grow. To do so offends basic fairness, substantial justice, and due process.

Accordingly, even if effect is not given to the settlements, these individuals should not be allowed to collect wildly inflated back pay awards, but should be limited to the amounts paid to

them in good faith pursuant to a valid contract, a contract that retains its validity, even if the Board should choose not to give it effect for purposes of its own enforcement proceedings.

CONCLUSION

For the reasons stated above and for the reasons set forth at length in Goya's initial brief, the decision of the judge should be rejected, the specification should be dismissed, and the Board should give effect to the settlement agreements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Susy Kucera, Esquire, Counsel for the General Counsel, National Labor Relations Board, Region 12, Miami Resident Office, 51 S.W. 1st Avenue, Room 1320, Miami, Florida 33130 and to Ira J. Katz, Esquire, Workers United, 31 West 15 Street, New York, New York 10011, this 16th day of May, 2011.

/s/ David C. Miller
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